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DEPARTMENT OF JUSTICE

28 CFR Part 16

CPCLO Order No. 006-2012

Privacy Act of 1974: Implementation

AGENCY: Drug Enforcement Administration, United States Department of Justice.

ACTION: Proposed rule.

SUMMARY: The Department of Justice (DOJ), Drug Enforcement Administration (DEA) proposes to amend its Privacy Act regulations for the modified system of records entitled the Investigative Reporting and Filing System (IRFS) (JUSTICE/DEA-008), published April 11, 2012 in the Federal Register. This system will be exempt from subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G), (H), (I), (5), and (8); (f); (g); and (h) of the Privacy Act of 1974 for the reasons set forth in the following text. The exemptions are necessary to avoid interference with the law enforcement and counterterrorism functions and responsibilities of the DEA.

DATES: Comments must be received by [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.]

ADDRESSES: Address all comments to the Department of Justice, ATTN: Privacy Analyst, Office of Privacy and Civil Liberties, Department of Justice, National Place Building, 1331 Pennsylvania Avenue, NW., Suite 1000, Washington, DC 20530 or by facsimile (202) 307-0693. To ensure proper handling, please reference the CPCLO Order

number in your correspondence. You may review an electronic version of the proposed rule at <http://www.regulations.gov> and may also comment at <http://www.regulations.gov>. Please include the CPCLLO Order number in the subject box.

Please note that the Department is requesting that electronic comments be submitted before midnight Eastern Standard Time on the day the comment period closes because <http://www.regulations.gov> terminates the public's ability to submit comments at that time. Commenters in time zones other than Eastern Standard Time may want to consider this so that their electronic comments are received. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov> and in the Department's public docket. Such information includes personally identifying information (such as your name, address, etc.) voluntarily submitted by you as the commenter.

If you want to submit personally identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase "PERSONALLY IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also place all the personally identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase “CONFIDENTIAL BUSINESS INFORMATION” in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted online or made available in the public docket.

Personally identifying information and confidential business information identified and located as set forth above will be redacted and the comment, in redacted form, will be posted online and placed in the Department’s public docket file. Please note that the Freedom of Information Act applies to all comments received. If you wish to inspect the agency’s public docket file in person by appointment, please see the “**FOR FURTHER INFORMATION**” paragraph.

FOR FURTHER INFORMATION CONTACT: DEA Headquarters, Attn: Bettie E. Goldman, CCA/Chief, 8701 Morrisette Drive, Springfield, VA 22152, 202-307-3624.

SUPPLEMENTARY INFORMATION: This proposed rule seeks to amend 28 CFR 16.98 to add paragraphs (i) and (j) as set forth below and to delete all references to “Investigative Reporting and Filing System (Justice/DEA-008)” from paragraphs (c) and (d) and to renumber the subparagraphs in paragraph (c) accordingly. These modified paragraphs exempt the “Investigative Reporting and Filing System (IRFS), JUSTICE/DEA-008” (77 FR 21808) from certain provisions of the Privacy Act, as amended.

In this rulemaking, the Department of Justice proposes to exempt certain records in this Privacy Act system of records from certain provisions of the Privacy Act because the system contains material compiled for law enforcement purposes.

Regulatory Flexibility Act

This proposed rule relates to individuals as opposed to small business entities. Pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, the proposed rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995, 44 U.S.C. 3507(d), requires that the Department of Justice consider the impact of paperwork and other information collection burdens imposed on the public. There is no current or new information collection requirements associated with this proposed rule.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4, 109 Stat. 48, requires federal agencies to assess the effects of certain regulatory actions on State, local, and tribal governments, and the private sector. UMRA requires a written statement of economic and regulatory alternatives for proposed and final rules that contain Federal mandates. A “federal mandate” is a new or additional enforceable duty, imposed on any state, local, or tribal government, or the private sector. If any federal mandate causes those entities to spend, in aggregate, \$100 million or more in any one year the UMRA analysis is required. This proposed rule would not impose federal mandates on any state, local, or tribal government or the private sector.

List of Subjects in 28 CFR Part 16

Administrative practices and procedures, Courts, Freedom of Information Act, Government in the Sunshine Act, and the Privacy Act.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a and delegated to me by Attorney General Order 2940-2008, it is proposed to amend 28 CFR part 16 as follows:

PART 16—[AMENDED]

1. The authority citation for part 16 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a, 552b(g), 553; 18 U.S.C. 4203(a)(1); 28 U.S.C. 509, 510, 534; 31 U.S.C. 3717, 9701.

Subpart E – Exemption of Records Systems Under the Privacy Act

2. In § 16.98, revise paragraphs (c) and (d) introductory text and add paragraphs (i) and (j) to read as follows:

§ 16.98 Exemption of Drug Enforcement Administration (DEA)—limited access.

* * * * *

(c) Systems of records identified in paragraphs (c)(1) through (c)(6) of this section are exempted pursuant to the provisions of 5 U.S.C. 552a (j)(2) from subsections (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (5), and (8); and (g) of 5 U.S.C. 552a. In addition, systems of records identified in paragraphs (c)(1), (c)(2), (c)(3), (c)(4), and (c)(5) of this section are also exempted pursuant to the provisions of 5 U.S.C. 552a (k)(1) from subsections (c)(3); (d)(1), (2), (3) and (4); and (e)(1):

(1) Air Intelligence Program (Justice/DEA-001)

(2) Clandestine Laboratory Seizure System (CLSS) (Justice/DEA-002)

(3) Planning and Inspection Division Records (Justice/DEA-010)

(4) Operation Files (Justice/DEA-011)

(5) Security Files (Justice/DEA-013)

(6) System to Retrieve Information from Drug Evidence (STRIDE/Ballistics)
(Justice/DEA-014)

(d) Exemptions apply to the following systems of records only to the extent that information in the systems is subject to exemption pursuant to 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2): Air Intelligence Program (Justice/DEA-001); Clandestine Laboratory Seizure System (CLSS) (Justice/DEA-002); Planning and Inspection Division Records (Justice/DEA-010); and Security Files (Justice/DEA-013). Exemptions apply to the Operations Files (Justice/DEA-011) only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2) and (k)(2). Exemptions apply to the System to Retrieve Information from Drug Evidence (STRIDE/Ballistics) (Justice/DEA-014) only to the extent that information in the system is subject to exemption pursuant to 5 U.S.C. 552a(j)(2). Exemption from the particular subsections is justified for the following reasons:

* * * * *

(i) The following system of records is exempt from 5 U.S.C. 552a (c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G), (H), (I), (5), and (8); (f); (g); and (h): Investigative Reporting and Filing System (IRFS) (JUSTICE/DEA-008). These exemptions apply only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. 552a (j)(2), (k)(1), or (k)(2). Where compliance would not appear to interfere with or adversely affect the law enforcement or counterterrorism

purposes of this system, or the overall law enforcement process, the applicable exemption may be waived by the DEA in its sole discretion.

(j) Exemptions from the particular subsections are justified for the following reasons:

(1) From subsection (c)(3) because to provide the subject with an accounting of disclosure of records in this system could impede or compromise an ongoing investigation, interfere with a law enforcement activity, lead to the disclosure of properly classified information which could compromise the national defense or disrupt foreign policy, invade the privacy of a person who provides information in connection with a particular investigation, or result in danger to an individual's safety, including the safety of a law enforcement officer.

(2) From subsection (c)(4) because this subsection is inapplicable to the extent that an exemption is being claimed for subsections (d)(1), (2), (3), and (4).

(3) From subsection (d)(1) because disclosure of records in the system could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of confidential witnesses and informants, of the investigative interest of the DEA, and lead to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; reveal the details of a sensitive investigative or intelligence technique, or the identity of a confidential source; or otherwise impede, compromise, or interfere with investigative efforts and other related law enforcement and/or intelligence activities. In addition, disclosure could invade the privacy of third parties and/or endanger the life,

health, and physical safety of law enforcement personnel, confidential informants, witnesses, and potential crime victims. Access to records could also result in the release of information properly classified pursuant to Executive Order, thereby compromising the national defense or foreign policy.

(4) From subsection (d)(2) because amendment of the records thought to be incorrect, irrelevant, or untimely would also interfere with ongoing investigations, criminal or civil law enforcement proceedings, and other law enforcement activities, and impose an impossible administrative burden by requiring investigations, analyses, and reports to be continuously reinvestigated and revised, as well as may impact information properly classified pursuant to Executive Order.

(5) From subsections (d)(3) and (4) because these subsections are inapplicable to the extent exemption is claimed from (d)(1) and (2).

(6) From subsection (e)(1) because, in the course of its acquisition, collation, and analysis of information under the statutory authority granted to it, an agency may occasionally obtain information, including information properly classified pursuant to Executive Order, that concerns actual or potential violations of law that are not strictly within its statutory or other authority or may compile information in the course of an investigation which may not be relevant to a specific prosecution. It is impossible to determine in advance what information collected during an investigation will be important or crucial to the apprehension of fugitives. In the interests of effective law enforcement, it is necessary to retain such information in this system of records because it can aid in establishing patterns of criminal activity and can provide valuable leads for federal and other law enforcement agencies. This consideration applies equally to

information acquired from, or collated or analyzed for, both law enforcement agencies and agencies of the U.S. foreign intelligence community and military community.

(7) From subsection (e)(2) because in a criminal investigation, prosecution, or proceeding, the requirement that information be collected to the greatest extent practicable from the subject individual would present a serious impediment to law enforcement because the subject of the investigation, prosecution, or proceeding would be placed on notice as to the existence and nature of the investigation, prosecution, and proceeding and would therefore be able to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Moreover, thorough and effective investigation and prosecution may require seeking information from a number of different sources.

(8) From subsection (e)(3) because the requirement that individuals supplying information be provided a form stating the requirements of subsection (e)(3) would constitute a serious impediment to criminal law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants and endanger their lives, health, and physical safety. The individual could seriously interfere with undercover investigative techniques and could take appropriate steps to evade the investigation or flee a specific area.

(9) From subsections (e)(4)(G), (H), and (I) because this system is exempt from the access provisions of subsection (d) pursuant to subsections (j) and (k) of the Privacy Act.

(10) From subsection (e)(5) because the acquisition, collation, and analysis of information for criminal law enforcement purposes from various agencies does not

permit a determination in advance or a prediction of what information will be matched with other information and thus whether it is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can often only be determined in a court of law. The restrictions imposed by subsection (e)(5) would restrict the ability of trained investigators, intelligence analysts, and government attorneys to exercise their judgment in collating and analyzing information and would impede the development of criminal or other intelligence necessary for effective law enforcement.

(11) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to criminal law enforcement by revealing investigative techniques, procedures, evidence, or interest and interfering with the ability to issue warrants or subpoenas, and could give persons sufficient warning to evade investigative efforts.

(12) From subsections (f) and (g) because this subsection is inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act.

(13) From subsection (h) when application of those provisions could impede or compromise an ongoing criminal investigation, interfere with a law enforcement activity,

reveal an investigatory technique or confidential source, invade the privacy of a person who provides information for an investigation, or endanger law enforcement personnel.

Dated: March 12, 2012

Nancy C. Libin
Chief Privacy and Civil Liberties Officer
United States Department of Justice

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